Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

SKYLINE LODGE, INC.,

Petitioner,

vs.

PHYLLIS DELANEY, KAREN WATTS, BRENDA LACKEY AND MARLENE SCHEIDT,

Respondents.

Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ohio courts violated petitioner's due process rights by failing to give notice and a hearing on the amount of punitive damages before awarding punitive damages against the petitioner.

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Petition For Writ Of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner Skyline Lodge, Inc. respectfully prays that this Court issue a writ of certiorari to review the entry of the Ohio Supreme Court of October 19, 1994 dismissing petitioner's appeal.

OPINIONS BELOW

1. Trial transcript at pages 628-635 and 796 is attached at Appendix A, showing that the trial court overruled petitioner's objection to allowing the jury to decide the amount of punitive damages.

2. The decision of the trial court on petitioner's motion for judgment n.o.v. is attached at Appendix D, showing that the trial court *post hoc* adopted the jury's punitive damage award, without affording petitioner advance notice or an opportunity to present evidence.

3. The judgment entry and decision of the First District Court of Appeals affirming the trial court's decision are attached as Appendix E and F, respectively.

4. The entry of the Ohio Supreme Court dismissing petitioner's appeal is attached at Appendix G.

JURISDICTIONAL STATEMENT

The Ohio Supreme Court issued its entry on October 19, 1994 dismissing petitioner's appeal. This petition for writ of certiorari is filed within 90 days, as required under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY FRAMEWORK

The Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law. . . .

The Ohio Revised Code provides:

Recovery of punitive or exemplary damages in tort actions.

(A) As used in this section:

(1) 'Tort action' means a civil action for damages for injury or loss to person or property. . . .

* * *

(C) (2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

Ohio Revised Code § 2315.21.

STATEMENT OF THE CASE

A. Procedural Background

Respondents Phyllis Delaney, Karen Watts, Brenda Lackey and Marlene Scheidt were waitresses at Skyline Lodge, Inc.'s restaurant. They sued Skyline Lodge for sexual harassment and related claims.

Ohio law provides that if the trier of fact determines that a plaintiff is entitled to punitive damages, the court shall decide the amount of punitive damages. Ohio Revised Code § 2315.21. After all the evidence was presented, the trial court announced that it would allow the jury to decide the amount of punitive damages, over Skyline Lodge's attorney's objection. (App. 1-23). The jury awarded punitive damages totalling $208,000 to the four waitresses. (App. 12-15). Skyline Lodge moved for judgment notwithstanding the verdict, remittitur and

new trial, on the ground that this procedure violated state law. The trial court denied the motion and sought to correct the error by retroactively adopting the jury's decision on the amount of punitive damages. (App. 24). The appellate court affirmed. (App. 25-45). The Ohio Supreme Court dismissed the appeal for lack of a substantial constitutional question. (App. 46).

Skyline Lodge was never allowed to present evidence on the proper amount of punitive damages.

B. Statement of Facts

Delaney, Watts, Lackey and Scheidt allege that Peter Boucher, the Skyline Lodge restaurant manager, began to use offensive language to them and tell them dirty jokes beginning November 1, 1990. (App. 28). Two weeks later, on November 15, 1990, the waitresses complained about Boucher to Gary Bradford, his supervisor. (*Id.*). They did not want Bradford to fire Boucher, but only to reprimand him.

Bradford investigated the waitresses' complaints by interviewing several other restaurant employees. Bradford learned that Delaney frequently told dirty jokes and used foul language herself. Nevertheless, Bradford warned Boucher not to use foul language or tell dirty jokes to anyone who might be offended by them. (App. 28). After Boucher was warned, he used foul language and told dirty jokes to other waitresses, but never again directed any foul language or told dirty jokes to these four waitresses.

Delaney was fired on November 20, 1990. She gave this explanation of Boucher's behavior after Bradford's warning:

> Q. Did anything else happen the rest of that weekend?
>
> A. Yes, the rest of the week, he was really cold to us. Walking around talking about how people go behind his back and lie about him. And how we're out to sabotage him. Mumbling, still cussing, cussed and the jokes, *but not to us.*
>
> * * *
>
> Q. You still heard the jokes, though?
>
> A. Still heard the jokes and the dirty language *but it was not directed toward us.*

(Transcript of proceedings at 246) (Emphasis added).

Watts testified that after Boucher received a warning he did not direct any foul language or dirty jokes toward her:

> Q. And isn't it true that after you went in and you made this complaint to Mr. Bradford that Mr. Boucher stopped telling dirty jokes or making dirty remarks, is that true?
>
> A. *Not that I can remember.*
>
> * * *
>
> Q. Okay. But, did he use the same foul language?
>
> A. It was the same foul language going through the restaurant. *It was not at me.*

(Transcript of proceedings at 194-195 and 198).

Lackey testified that after Boucher received his warning, Boucher "would not get really close to me and directly to me, tell me the jokes or anything else." (Transcript of proceedings at 459). Similarly, there is no evidence that Boucher directed any foul language or dirty jokes to Scheidt after he received his warning. (Transcript of proceedings at 394-395).

Despite this paucity of evidence, the jury found Skyline Lodge liable for sexual harassment and assessed compensatory and punitive damages. Skyline Lodge had no opportunity to present evidence to minimize the amount of the punitive damage award because the trial court waited until the end of trial to announce that it would let the jury decide this issue. (App. 1-8). Similarly, when the appellate court retroactively "adopted" the jury's punitive damage award, Skyline Lodge received no opportunity to present evidence on this issue.

Skyline Lodge appeals this denial of procedural due process.

REASONS FOR GRANTING THE WRIT

The Ohio courts violated petitioner's Fourteenth Amendment right to procedural due process by failing to give notice and opportunity to present evidence on the amount of punitive damages.

In recent years, many states have responded to a perceived increase in the amount of damages awarded in tort cases by enacting tort reform laws. These tort reform laws typically address how punitive damages are awarded. Under one approach, the jury decides whether

to award punitive damages and the court decides the amount. Some of the states using the approach expressly provide for the court to hold a separate hearing before deciding for the amount of punitive damages. Ala. Code § 6-11-23; Kan. Stat §§ 60-3701 and 60-3702. In other states using this approach, the law is silent as to whether a separate hearing is required before the court decides the amount of punitive damages. Conn. Gen. Stat. § 52-2406; Ohio Rev. Code § 2315.21.

The present case was decided under Ohio Rev. Code 2315.21. The trial court violated this statute by allowing the jury to decide the amount of punitive damages. The trial court did not announce that it was submitting this issue to the jury until after all the evidence was presented at trial. This deprived petitioner of its right to a hearing on the amount of punitive damages.

Petitioner could have introduced the following evidence at a hearing on the amount of punitive damages: (1.) petitioner's current financial condition; (2.) the impact of a punitive damages award on petitioner's financial condition; (3.) the fact that one of the waitresses had already received an NLRB award against petitioner arising out of the same facts; and (4.) subsequent remedial measures adopted by petitioner to address sexual harassment complaints. See Restatement (Second) of Torts § 908 comment e (1977). This evidence was inadmissible in the underlying sexual harassment trial. Since petitioner had no advance notice that the jury would decide the amount of punitive damages, petitioner lost its opportunity to present this evidence and to be heard on it.

The purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331 (1994). Due Process includes the basic right to notice and a hearing before a deprivation of liberty or property occurs. *In re Winship*, 397 U.S. 358 (1970); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Tumey v. Ohio*, 273 U.S. 510 (1927). When punitive damages are awarded, there is "an acute danger" that a defendant's due process rights may be violated due to the arbitrary manner in which punitive damages are assessed. *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331 (1994).

Due process includes a right to judicial review of the size of punitive damage awards. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. ___, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Obviously, a defendant cannot avail himself of this right unless he has advance notice and an opportunity to present evidence on the amount of punitive damages. The Ohio courts violated petitioner's due process rights by failing to give notice and a hearing on the amount of punitive damages. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

CONCLUSION

Petitioner respectively requests that this Court grant this petition for writ of certiorari and declare unconstitutional the Ohio statutory scheme which allows the amount of punitive damages to be decided without giving the defendant advance notice and an opportunity to present evidence.

Respectfully submitted,

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Of Counsel:
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APPENDIX A

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

Phyllis Delaney, Karen Watts, Brenda Lackey, and Marlene Scheidt Plaintiffs, versus Skyline Lodge, Inc., Defendant.	: : : : : : : : : : :	Case Nos. A9104470 C9200924 (Volume Five of Five) (Filed Mar. 15, 1993)

APPEARANCES:

Willard L. Harvey, Esq.,

On behalf of the plaintiffs.

John J. Finnigan, Jr., Esq.,

On behalf of the defendant.

BE IT REMEMBERED that upon the trial in this case, on the dates hereinafter indicated, before the Honorable Robert P. Ruehlman, one of the judges of the said Court, and a jury, duly impaneled and sworn to try the issues in this cause, the following proceedings were had.

[p. 629] MORNING SESSION, SEPTEMBER 8, 1992.

(The following proceedings were had in the Court's chambers.)

THE COURT: This is on Phyllis Delaney, et al., versus Skyline Lodge, and we've got the two case

numbers, A9109470, consolidated with A9105315. And I know you've rested and everything and there's been rebuttal, but before we do closing you wanted to make a motion?

MR. FINNIGAN: Yes, Judge. I just want to renew my motion for directed verdict at this time on a couple of points. One, you apparently accept our instruction on supervisory liability, which says, in essence, that Skyline can't be liable unless the evidence shows they knew of or approved – and approved of Mr. Boucher's conduct.

THE COURT: Yes.

MR. FINNIGAN: And the facts show that the plaintiffs' first complaint to Skyline was on November 15th, and Delaney was fired on November 20th – or – yeah, November 20th. So there's no evidence of what happened to her between the fifteenth and the twentieth.

The evidence as to when Boucher found out [p. 630] that anybody complained about her would be – or about him – would be the nineteenth at the meeting that he attended. So I would submit that there is no evidence to support that anybody harassed Delaney between the fifteenth and the twentieth when she was fired.

The other thing is, on defamation, there was some testimony that Boucher called the plaintiffs troublemakers and said that they were fired from every job that they had, but that comment was just made to another employee of the restaurant, and there was no evidence that anybody from Skyline knew of or approved of or ratified that conduct.

So I would submit that they haven't established that Boucher's defamatory conduct or defamatory statement, if any, was within the course and scope of his employment.

The other thing is I also want to renew the motion for directed verdict as to the plaintiffs' claim that this conduct by Skyline violates public policy because they had that whistle-blower claim and then they threw it out and they just rested on their public policy claim, but the whistle-blower statute covers [p. 631] what they're trying to prove here; that is, that statute covers a report to the employer of a felony, and the statute says that if you comply with the whistle-blower statute, you can't be discharged for reporting a felony if you're fired for making that report.

THE COURT: Right.

MR. FINNIGAN: But here they've dropped that claim. So I would submit that they – there is no such common-law claim, and the only way to make out such a claim is by statute. And I would rely on that Tulloh, T-u-l-l-o-h, case versus Goodyear that sets that out.

THE COURT: You can't fire somebody if they refuse – whether they're charged under the whistle blower or not. You could bring a suit if you were fired for refusing to perform a crime or reporting the performance of a crime, whether they – whether you're sued under the whistle blower or not, you can't be fired for that.

MR. FINNIGAN: The other –

THE COURT: At least that's the way I interpret the law as it exists.

MR. FINNIGAN: The other thing is, as to [p. 632] their punitive damages claim, I would submit this is covered by 2315.21 of the Ohio Revised Code, the Tort Reform Act, which covers the standard they have to meet for proving punitive damages.

THE COURT: That's the standard I put in there.

MR. FINNIGAN: That's in the jury instructions. I noticed that. I would submit that the evidence doesn't establish that Skyline acted with any malice or oppressive behavior towards the plaintiff, regardless of what Boucher might have done.

THE COURT: It's a high standard, I know.

MR. FINNIGAN: And also, given the fact they've got to prove that by clear and convincing evidence, which I would submit they haven't proved here.

The other thing is – that's all I have as to the motion for a directed verdict.

The one thing I do want to bring to the Court's attention with regard to the jury instructions and the verdict forms is that, the way they appear to be drafted, they leave it up to the jury to decide, not only whether punitive [p. 633] damages should be awarded, but also the amount. And I would submit that the jury should only determine whether punitive damages should be awarded, and then it would be up to the Court to determine the amount of punitive damages.

THE COURT: Well, that's really a funny area of the law there on punitive. I mean, I went over that. I kept reading that over and over, and I was doing the instructions on the new – under the Tort Reform Act.

How do you feel about that?

MR. HARVEY: I think maybe the safest way to do it is have the jury decide it and you can take that as an advisory.

THE COURT: I think they can decide because they have it right there. It's not to punish – I mean, it's to punish. That's one thing to do, as to punish; that's why they grant punitive, is to punish. So I think it's in there. I think they do decide because if they put that, why would – there's also the issue of whether attorney fees apply. You said you indicated you don't want to do that. You indicated earlier that both of you would rather leave the attorney fees out, right?

[p. 634] MR. FINNIGAN: Right. In terms of putting on any testimony from one of Mr. Harvey's partners as to the amount of fees, I don't think that would be proof.

THE COURT: I'm going to leave that in on the punitive damages. As far as your motion, I'm going to overrule it. I think it's a question for the jury. Although it's not a real strong case, I think it's a question for the jury. There's not a lot there, but we've gone this far. There's some there; there's some evidence. I'm going to let it go to the jury. Okay.

MR. FINNIGAN: The only other thing is just a couple of minor points as to the jury instructions that we can take up after closing arguments.

THE COURT: You can do that afterwards.

(The proceedings in the Court's chambers were concluded.)

(The jury entered the courtroom at 10:45.)

THE COURT: Good morning, ladies and gentlemen. We struggled through that criminal docket. We lost one prisoner, and we finally found him.

* * *

[p. 796] COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Phyllis Delaney, Karen Watts, Brenda Lackey, and Marlene Scheidt Plaintiffs, versus Skyline Lodge, Inc., Defendant.	: : : : : : : : : : :	Case Nos. A9104470 C9200924

CERTIFICATE

I, R. E. Simonson, an official shorthand reporter for the Court of Common Pleas, duly appointed by the Court to report the proceedings in this cause, do hereby certify that the foregoing pages constitutes a true and complete transcription of my notes, taken in stenotypy, [sic] of the proceedings in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand at Cincinnati, Ohio, on this twelfth day of March 1993.

/s/ R. E. Simonson
R. E. Simonson
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio

APPENDIX B

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

PHYLLIS DELANEY	:	CASE Nos.
and	:	A-9104470
KAREN WATTS	:	A-9105315
and	:	(Robert P. Ruehlman)
BRENDA LACKEY	:	
and	:	*INTERROGATORIES*
MARLENE SCHEIDT	:	
Plaintiffs	:	
-vs-	:	
SKYLINE LODGE, INC.	:	
Defendant	:	

1. Do you find that the plaintiff Phyllis Delaney was terminated for complaining that the defendant was engaged in illegal activities and/or because she refused to engage in illegal activity?

_____X_____ Yes _____ NO

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	
	Foreperson

2. Do you find that the plaintiff Karen Watts was terminated for complaining that the defendant was engaged in illegal activities and/or because she refused to engage in illegal activity?

_____ Yes ___X___ NO

Daryl Cammerer	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Joseph Guido	

Foreperson

3. Do you find that the plaintiff Brenda Lackey was terminated for complaining that the defendant was engaged in illegal activities and/or because she refused to engage in illegal activity?

_____ Yes ___X___ NO

Daryl L. Cammerer	Mary E. Frisby
Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell

Foreperson

4. Do you find that the plaintiff Marlene Scheidt was terminated for complaining that the defendant was engaged in illegal activities and/or because she refused to engage in illegal activity?

_____ Yes ___X___ NO

Arthur Chapman	Lucille Cornish
David R. Hail	
Mary E. Frisby	
Joseph Guido	Daryl Cammerer

Foreperson

5. Do you find that the plaintiff Phyllis Delaney was terminated because she complained that an employee of the defendant sexually harassed her?

X Yes _____ NO

Richard W. Baker
Arthur Chapman
David R. Hail
Mary E. Frisby
Lucille Cornish
Ray Fitzjarrell

Foreperson

6. Do you find that the plaintiff Karen Watts was terminated because she complained that an employee of the defendant sexually harassed her?

_____ Yes X NO

Arthur Chapman
Mary E. Frisby
Joseph Guido
Lucille Cornish
Ray Fitzjarrell
Daryl Cammerer

Foreperson

7. Do you find that the plaintiff Brenda Lackey was terminated because she complained that an employee of the defendant sexually harassed her?

_____ Yes X NO

Ray Fitzjarrell
Lucille Cornish
Joseph Guido
Mary E. Frisby
David R. Hail
Arthur Chapman
Daryl Cammerer

Foreperson

8. Do you find that the plaintiff Marlene Scheidt was terminated because she complained that an employee of the defendant sexually harassed her?

_____ Yes ___X___ NO

Richard W. Baker	Joseph H. Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

9. Do you find that the plaintiff Phyllis Delaney was sexually harassed?

___X___ Yes _____ NO

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	Daryl Cammerer
	Foreperson

10. Do you find that the plaintiff Karen Watts was sexually harassed?

___X___ Yes _____ NO

Ray Fitzjarrell	Arthur Chapman
Lucille Cornish	Richard W. Baker
Mary E. Frisby	
David R. Hail	
	Foreperson

11. Do you find that the plaintiff Brenda Lackey was sexually harassed?

X Yes _____ NO

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	
	Ray Fitzjarrell
Mary E. Frisby	
	Foreperson

12. Do you find that the plaintiff Marlene Scheidt was sexually harassed?

X Yes _____ NO

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

13. If you find that the plaintiff Phyllis Delaney was terminated for complaining about illegal activity and/or sexual harassment and/or if you find that she was sexually harassed, you must then determine her compensatory damages and punitive damages.

Compensatory damages $ 30,000.00

Richard W. Baker	Mary E. Frisby
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Lucille Cornish	

Foreperson

Punitive damages $ 33,000.00

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	

Foreperson

14. If you find that the plaintiff Karen Watts was terminated for complaining about illegal activity and/or sexual harassment and/or if you find that she was sexually harassed, you must then determine her compensatory damages and punitive damages.

Compensatory damages $ 20,000.00

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	

Foreperson

Punitive damages $ 20,000.00

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	

Foreperson

15. If you find that the plaintiff Brenda Lackey was terminated for complaining about illegal activity and/or sexual harassment and/or if you find that she was sexually harassed, you must then determine her compensatory damages and punitive damages.

Compensatory damages $ 16,000.00

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	

Foreperson

Punitive damages $ 28,000.00

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	

Foreperson

16. If you find that the plaintiff Marlene Scheidt was terminated for complaining about illegal activity and/or sexual harassment and/or if you find that she was sexually harassed, you must then determine her compensatory damages and punitive damages.

Compensatory damages $ 16,000.00

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer

Foreperson

Punitive damages $ 45,000.00

Richard W. Baker	Lucille Cornish
Arthur Chapman	Ray Fitzjarrell
David R. Hail	
Mary E. Frisby	

Foreperson

17. Do you find that the defendant's restaurant manager made and published false accusations regarding Phyllis Delaney?

_____ Yes ___X___ NO

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer

Foreperson

18. Do you find that the defendant's restaurant manager made and published false accusations regarding Karen Watts?

_____ Yes ___X___ NO

Ray Fitzjarrell	David R. Hail
Lucille Cornish	Arthur Chapman
Joseph Guido	Richard W. Baker
Mary E. Frisby	Daryl Cammerer

Foreperson

19. If you find for the plaintiff Phyllis Delaney on her claim for defamation, you must then determine her compensatory and punitive damages.

Compensatory damages $ 0

Ray Fitzjarrell	Arthur Chapman
Lucille Cornish	Richard W. Baker
Joseph Guido	Mary E. Frisby
David R. Hail	Daryl Cammerer

Foreperson

Punitive damages $ 0

Ray Fitzjarrell	David R. Hail
Lucille Cornish	Arthur Chapman
Joseph Guido	Richard W. Baker
Mary E. Frisby	Daryl Cammerer

Foreperson

20. If you find for the plaintiff Karen Watts on her claim for defamation, you must then determine her compensatory and punitive damages.

Compensatory damages $ 0

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

Punitive damages $ 0

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY	:	CASE Nos.
and	:	A-9104470
KAREN WATTS	:	A-9105315
and	:	(Robert P. Ruehlman)
BRENDA LACKEY	:	
and	:	*VERDICT*
MARLENE SCHEIDT	:	
Plaintiffs	:	
-vs-	:	
SKYLINE LODGE, INC.	:	
Defendant	:	

We, the Jury, being duly impaneled and sworn and affirmed in the issue joined, find in favor of the plaintiff, Marlene Scheidt.

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY	:	CASE Nos.
and	:	A-9104470
KAREN WATTS	:	A-9105315
and	:	(Robert P. Ruehlman)
BRENDA LACKEY	:	
and	:	*VERDICT*
MARLENE SCHEIDT	:	
Plaintiffs	:	
-vs-	:	
SKYLINE LODGE, INC.	:	
Defendant	:	

We, the Jury, being duly impaneled and sworn and affirmed in the issue joined, find in favor of the plaintiff, Brenda Lackey.

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY	:	CASE Nos.
and	:	A-9104470
KAREN WATTS	:	A-9105315
and	:	(Robert P. Ruehlman)
BRENDA LACKEY	:	
and	:	*VERDICT*
MARLENE SCHEIDT	:	
Plaintiffs	:	
-vs-	:	
SKYLINE LODGE, INC.	:	
Defendant	:	

We, the Jury, being duly impaneled and sworn and affirmed in the issue joined, find in favor of the plaintiff, Karen Watts.

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY	:	CASE Nos.
and	:	A-9104470
KAREN WATTS	:	A-9105315
and	:	(Robert P. Ruehlman)
BRENDA LACKEY	:	
and	:	*VERDICT*
MARLENE SCHEIDT	:	
Plaintiffs	:	
-vs-	:	
SKYLINE LODGE, INC.	:	
Defendant	:	

We, the Jury, being duly impaneled and sworn and affirmed in the issue joined, find in favor of the plaintiff, Phyllis Delaney.

Richard W. Baker	Joseph Guido
Arthur Chapman	Lucille Cornish
David R. Hail	Ray Fitzjarrell
Mary E. Frisby	Daryl Cammerer
	Foreperson

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY, et al/ BRENDA LACKEY, et al	:	CASE NO. A9104470
Plaintiffs	:	CASE NO. A9105315
vs.	:	[CONSOLIDATED
SKYLINE LODGE, INC.	:	FOR TRIAL]
Defendant	:	Judge Ruehlman
	:	ENTRY OF JUDGMENT

This case came for trial before this Court and a jury, and the Court having instructed the jury to answer interrogatories and return a verdict, and the jury having answered the interrogatories and having rendered a verdict in favor of Plaintiffs, judgment is hereby entered, and compensatory damages, including damages for lost back-pay, lost front pay, emotional distress., are awarded in the sum of $30,000.00 for Plaintiff Delaney, $20,000.00 for Plaintiff Watts, $16,000.00 for Plaintiff Lackey, and $16,000.00 for Plaintiff Scheidt.

Punitive damages are awarded in the amount of $33,000.00 for Plaintiff Delaney, $20,000.00 for Plaintiff Watts, $28,000.00 for Plaintiff Lackey and $45,000.00 for Plaintiff Scheidt.

The parties having reserved the issue of attorney fees for the Court in the event of an award of punitive damages, and

the jury having awarded punitive damages, the Court will determine the fees to be awarded.

Date	Judge Robert Ruehlman
Have Seen – John J. Finnegan, Jr.	With exceptions. /s/ John J. Finnigan, Jr. 11/11/92 Willard L. Harvey

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY, et al/ BRENDA LACKEY, et al	:	CASE NO. A9104470
Plaintiffs	:	CASE NO. A9105315
vs.	:	[CONSOLIDATED FOR
SKYLINE LODGE, INC.	:	TRIAL]
Defendant	:	Judge Ruehlman
	:	ENTRY DENYING DEFENDANT'S MOTION FOR JNOV, OR, IN THE ALTERNATIVE, FOR NEW TRIAL OR REMITTITUR

This matter is before the Court on Defendant's motion for judgment notwithstanding the verdict, or, in the alternative for a new trial, or remittitur. Having considered the briefs and the arguments of the parties, Defendant's motion is hereby denied and the jury's award of punitive damages is hereby adopted by this Court.

Date	Judge Robert Ruehlman
Have Seen – John J. Finnegan, Jr.	With exceptions. /s/ John J. Finnigan, Jr. 11/11/92 Willard L. Harvey

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PHYLLIS DELANEY, and KAREN WATTS, and BRENDA LACKEY, and MARLENE SCHEIDT,	:	APPEAL NO. C-920924 TRIAL NOS.
Plaintiffs-Appellees,	:	A-9104470 A-9105315
vs.	:	
SKYLINE LODGE, INC.	:	JUDGMENT ENTRY
Defendant-Appellant.	:	

This cause having been heard upon the appeal, the record filed herein, briefs, and arguments and

Upon consideration thereof, it is the Order of this Court that the judgment of the trial court is affirmed for the reasons set forth in the Decision filed herein and made a part hereof.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that costs be taxed in compliance with App. R. 24, that a copy of this Judgment with a copy of the Decision shall constitute the mandate, and that said mandate shall be sent to the trial court for execution pursuant to App. R. 27.

Exceptions noted.

To the Clerk:

Enter upon the Journal of the Court on 5/18/94 per Order of the Court /s/ Hildebrandt, J.

Presiding Judge

APPENDIX F

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

PHYLLIS DELANEY,	:	APPEAL NO. C-920924
and	:	TRIAL NOS. A-9104470
KAREN WATTS,	:	A-9105315
and	:	DECISION.
BRENDA LACKEY,	:	
and	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
MARLENE SCHEIDT,	:	
Plaintiffs-Appellees,	:	MAY 18, 1994
vs.	:	COURT OF APPEALS
SKYLINE LODGE, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: May 18, 1994

Tobias, Kraus & Torchia and Willard L. Harvey, Esq., No. 0046863, 911 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellees,

John J. Finnigan, Jr., Esq., No. 0018689, 1200 Gwynne Building, 602 Main, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original

papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the assignments of error, and the briefs and arguments of counsel.

This case arose from the sexual harassment of the four plaintiffs-appellees, Phyllis Delaney, Karen Watts, Brenda Lackey, and Marlene Scheidt, waitresses for defendant-appellant, Skyline Lodge, Inc., by Peter Boucher, a manager of Edward's, a restaurant owned by appellant.

The appellees claim that in 1990, Boucher began telling offensive jokes and making remarks of a sexual nature in their presence. Boucher told the jokes in the public and work areas of the restaurant. Boucher made off-color remarks in front of customers while placing his arm around the appellees and drawing them close to him. He referred to the female waitresses as "cunts" and "bitches." He made disparaging, unwelcome remarks about Delaney's breasts in public. He told Scheidt that she could go home early and "give her husband some," that he bet she got "laid" last night and that he presumed she was good in bed.

Despite appellees' entreaties, Boucher did not stop his offensive remarks and conduct. On November 15, 1990, appellees complained to Gary Bradford, appellant's operations manager, raising concerns over the abusive sexual harassment by Boucher.

Bradford spoke to Boucher. He informed Boucher not to tell dirty jokes to anyone who might be offended by them. Five days later, Bradford told appellees their allegations were untrue and to drop their allegations if they

wished to remain employed. Bradford fired Delaney the same day.

Boucher continued to tell sexually explicit jokes in appellees' presence, though not directly to them. He lowered his pants while staring directly at Scheidt. Moreover, two of the appellees were threatened by Boucher. He declared that he had a gun in his car and would not hesitate to use it "if anybody screws me and gets in my way." Appellees complained to appellant's controller that Boucher was a pervert from "A to Z."

By mid-December 1990, all the appellees either had been fired or had left appellant's employ.

In response to these incidents, the four appellees brought this action against appellant for firing them in violation of public policy, for sexual harassment in violation of R.C. Chapter 4112, and for defamation.

On September 9, 1992, the jury answered special interrogatories and rendered a verdict in favor of appellant on all the wrongful-discharge claims, except as to appellee Delaney. The jury also found in appellant's favor on all the defamation claims, returned a verdict for all the appellees on their sexual-harassment claims, and awarded damages for sexual harassment.

The trial court then entered judgment for the appellees including compensatory damages for lost pay and emotional distress in the total amount of $82,000.[1] The

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[1] The award was specified as follows: appellee Delaney received $33,000; Watts received $20,000; Lackey received $16,000; and Scheidt received $16,000.

court also awarded punitive damages in the amount of $126,000.[2] This timely appeal followed the trial court's denial of appellant's motion for judgment notwithstanding the verdict or, in the alternative, for remittitur or new trial.

In three assignments of error, appellant questions the judgments against it on the claims of sexual harassment. Appellant first asserts that the trial court erred by denying summary judgment in its favor on appellee Watts's claim of sexual harassment in violation of R.C. 4112.02. Appellant contends that, under the standard for summary judgment in sexual-harassment cases, identified in *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486, 492-493, 575 N.E.2d 428, 433-434, there is no genuine issue of material fact as to whether Boucher's sexual harassment continued after appellant received notice of Boucher's "past history of sexually harassing behavior," on or about November 15, 1990. Nonetheless, appellant claims, the trial court erroneously denied its motion for summary judgment without elaboration.

Summary judgment is appropriate where, with the evidence construed most strongly in favor of the party against whom the motion is directed, no genuine issue of material fact remains to be litigated which could establish the existence of an element essential to the non-moving party's claim or defense. *Celotex v. Catrett* (1986), 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (adopted by the Supreme Court of Ohio in *Wing v. Anchor Media, Ltd. of Texas*

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[2] Appellee Delaney received $33,000; Watts $20,000; Lackey $28,000; and Scheidt received $45,000.

[1991], 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus); Civ.R. 56.

In *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510, the Supreme Court provided guidance for a determination of which facts are material in a given case, stating that:

> The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

As an initial matter, we must identify the proper governing substantive law. Only then can we know which, if any, factual disputes are material.

It is uncontroverted that appellees' claims for sexual harassment were brought pursuant to R.C. Chapter 4112. In *Kerans*, the plaintiffs' claims were not. There, the supreme court, based upon strong public-policy grounds, recognized a common-law right to sue an employer for sexual harassment. *Kerans*, 61 Ohio St.3d at 495, 575 N.E.2d at 455. Under R.C. Chapter 4112, however, harassment on the basis of sex is statutorily proscribed.[3] R.C. 4112.02(A) states:

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[3] In *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056, the Supreme Court of Ohio found that R.C. 4112.99 created a private cause of action for violations of R.C. Chapter 4112. The court stated that:

> [T]he clear and unambiguous language of the statute provides that a civil action for damages or injunctive relief is afforded by R.C. 4112.99 as an available remedy. Moreover, the section specifically states that the

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the * * * sex * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

To determine the essential elements of a claim of sexual harassment pursuant to R.C. 4112.02(A), we look to the statute itself, to the administrative gloss,[4] and to

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> civil action is available to remedy any violation of this chapter [*i.e.*, R.C. Chapter 4112].

Id. at 136, 573 N.E.2d at 1058. Pursuant to R.C. 4112.99, an employer is subject to a civil action for back pay, compensatory and punitive damages, injunctive relief, or any other appropriate relief.

[4] Ohio Adm.Code 4112-5-05 (J) provides that:

> (1) * * * Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> * * *
>
> (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> * * *
>
> (3) Applying general agency principles, an employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

the federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) *et seq.*, Title 42 U.S. Code. *Little Forest Medical Ctr. v. Ohio Civil Rights Comm.* (1991), 61 Ohio St.3d 607, 609-10, 575 N.E.2d 1164, 1167, certiorari denied (1992), ___ U.S. ___, 112 S.Ct. 1263, citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 421 N.E.2d 128 (Title VII evidentiary formula generally applicable to cases involving violations of R.C. Chapter 4112); *Meritor Sav. Bank, FSB v. Vinson* (1986), 477 U.S. 57, 106 S.Ct. 2399.[5]

Therefore, we adopt the following as the elements of a claim, brought under R.C. Chapter 4112, against an employer for "hostile work environment" sexual harassment: (1) the employee was a member of the protected class; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based upon sex; (4) the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment; and (5) the existence of *respondeat superior* liability. *Harris v. Forklift System, Inc.* (1993), ___

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[5] In *Neal v. Hamilton Cty.* (1993), 87 Ohio App.3d 670, 622 N.E.2d 1130, this court specifically adopted the Title VII reasoning for use in analyzing claims of disparate treatment brought pursuant to R.C. Chapter 4112. Accord *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.* (1990), 64 Ohio App.3d 480, 581 N.E.2d 1169 (Title VII standard adopted for "hostile environment" sexual-harassment claims); *Barney v. Chi Chi's, Inc.* (1992), 84 Ohio App.3d 40, 616 N.E.2d 269 (Title VII standard adopted in affirming the entry of summary judgment in an action for sexual and racial harassment).

U.S. ___, 114 S.Ct. 367; *Rabidue v. Osceala Refining Co.* (C.A.6, 1986), 805 F.2d 611, certiorari denied (1987), 481 U.S. 1041, 107 S.Ct. 1983. Under the doctrine of *respondeat superior*, an employer is liable for sexual harassment by a supervisor if the employer knew or should have known of its occurrence, and failed to take remedial action. See *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.*

In considering appellant's assignment of error, then, this court must determine if there remains a genuine issue of material fact as to whether appellee Watts was subjected to continued sexual harassment in the form of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct after she complained to appellant.

Our review of the evidentiary materials, available pursuant to Civ.R. 56(C), with the evidence construed most strongly in favor of the non-moving party, reveals that genuine issues of material fact remain as to whether sexual harassment continued after November 15, 1990, in light of the evidence that Boucher continued to tell sexually based jokes and dropped his pants while boasting of his genital size. See *Davis v. Black* (1991), 70 Ohio App.3d 359, 366, 591 N.E.2d 11, 16 (liability of employer for "hostile work environment" sexual harassment ordinarily presents a question of fact). Accordingly, appellant's first assignment of error is not well taken.

In its fourth assignment of error, appellant claims the trial court erred in overruling its motion for directed verdict on all the appellees' claims of sexual harassment. Appellant contends, as it did in its first assignment of error, that "no sexual harassment occurred after it was

put on notice of the complaints against Boucher and had reprimanded him.

A directed verdict should only be granted where the trial court, without weighing the evidence or the credibility of the witnesses and after construing the evidence most strongly in favor of the non-moving party, determines reasonable minds could come to but one conclusion on the evidence submitted and that conclusion is adverse to such party. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 423 N.E.2d 467. This requires the court to determine only whether there exists any evidence of substantial probative value in support of the non-moving party's claim. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935, 938. If there is evidence which, if believed, would permit reasonable minds to come to different conclusions, the issue must be submitted to the jury.

We overrule appellant's fourth assignment of error as there was evidence of substantial probative value adduced at trial which, if believed, would permit reasonable minds to conclude that the female appellees' male supervisor made offensive and unwelcome sexual advances and requests for sexual favors, and engaged in other verbal and physical conduct of a sexual nature during working hours, at Edward's restaurant, and when appellees complained, the conduct continued in the form of sexual jokes told by the supervisor during working hours in the presence of the appellees and in the lowering of the supervisor's pants in front of appellee Scheidt and two other waitresses.

In three assignments of error, appellant next contests the monetary damages awarded in this case. Appellant challenges the appropriateness of the award in its second assignment of error. The court, appellant claims, was barred from awarding money damages to the appellees as the appellees never specified the amount of compensatory or punitive damages sought. Appellant, relying upon Civ.R. 54(C) in support of its argument, contends that appellees' failure to amend their complaints to specify the amount of damages sought bars them from recovering any damages at all.

Civ.R. 54(C) provides, in pertinent part:

> [A] demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless [the claimant] amends [the] demand not later than seven days before the commencement of the trial. Additional service of process is not necessary upon such amendment.

Generally, therefore, an award of damages cannot exceed the prayer for damages that was in effect on the sixth day prior to trial. *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 485 N.E.2d 704; *Cincinnati Art Galleries v. Fatzie* (1990), 70 Ohio App.3d 696, 591 N.E.2d 1336. One of the justifications requiring specification of the demand is notice to the defendant of his potential liability exposure. *Bishop v. Grdina*. Rigid application of the rule in this case would necessitate the entry of zero dollars in damages for the appellees.

In 1993 the Supreme Court of Ohio, however, in finding R.C. 2309.01 unconstitutional, declared that:

> Th[e] additional requirement [of R.C. 2309.01] has led to harsh results in that plaintiffs who specify no actual damages in the original complaint, in an attempt to comply with R.C. 2309.01, face a judgment for zero damages when they do not later comply with the R.C. 2309.01 requirement that they amend the complaint. Regardless of whether these situations are framed as failure to comply with Civ.R. 54(C) or as noncompliance with R.C. 2309.01, they are all glaring examples of the inherent unfairness which results from the R.C. 2309.01 requirement that plaintiff specify no damages in the original complaint when these damages are in excess of twenty-five thousand dollars.

Rockey v. 84 Lumber Co. (1993), 66 Ohio St.3d 221, 224, 611 N.E.2d 789, 791.[6]

In *Walsh v. Jagadeesan*, one of the three cases consolidated into *Rockey*, the court identified and remedied one example of inherent unfairness by excusing plaintiffs who failed to amend their complaint and specify a dollar amount of damages sought before trial pursuant to Civ.R.

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[6] Other grounds for relieving a plaintiff from the application of Civ.R. 54(C) include when defendant's failure to provide complete, accurate discovery in a timely fashion denies amendment of the damages prayer, *Smolik v. Andrews Custom Builders, Inc.* (1990), 62 Ohio App.3d 872, 577 N.E.2d 726, and when the procedural statute upon which plaintiff relies to exclude a demand for a specific amount of monetary damages in her complaint is declared unconstitutional by the trial court after plaintiff has presented an opening statement, and the trial court denies plaintiff's motion for leave to amend the complaint to include a specific demand for damages, on the ground that the motion is untimely under Civ.R. 54(C), *Washington v. Whalen* (Sept. 1, 1993), Hamilton App. No. C-920145, unreported.

54(C). The defendant in *Walsh* failed to raise a protest until after the jury had been charged. The supreme court held that the failure to raise the matter at the appropriate time during the trial constituted waiver. *Rockey*, 66 Ohio St.3d at 226, 611 N.E.2d at 792.

In *Bentley v. Smallwood* (June 25, 1993), Vinton App. No. 471, unreported, the Ohio Court of Appeals for the Fourth District, relying on *Rockey*, held that, as in the case *sub judice*, the defendant's failure to raise the lack of any specific monetary demand until the filing of a motion for judgment notwithstanding the verdict similarly constituted waiver.

Our review of the record here reveals that appellees' complaints sought unspecified damage amounts for lost pay, medical expenses, and punitive damages. The joint pretrial statement filed with the court, and signed by counsel for appellant and appellees, itemized the lost wages of appellees Lackey and Scheidt. Extensive evidence was heard at trial regarding the amount of lost wages and emotional distress, without objection.

Despite making two motions for directed verdict, filing its proposed jury instructions numbers eight through twelve dealing with calculation of damages, and posing no relevant objection to the jury instructions on both compensatory and punitive damages, the appellant waited until it filed its Civ.R. 50(B) motion for judgment notwithstanding the verdict to complain of the appellees' failure to amend their complaints. We hold that appellant's failure to raise the lack of any specific monetary demand, despite adequate notice of claims of compensatory and punitive damages, until its motion for judgment

notwithstanding the verdict constituted waiver. The second assignment of error is overruled.

Appellant's third assignment of error also assails the entry of punitive damages by the trial court. Over appellant's objection, the jury was permitted to decide not only whether punitive damages were merited, but also the amount of those damages. Appellant claims that this is error of sufficient magnitude to mandate reversal of the trial court's judgment. We disagree.

R.C. 2315.21(C)(2) provides that:

> [i]n a tort action * * * if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

Here the amount of the damages was erroneously submitted to the jury in contravention of the statute. See *Bazali v. Winkle Chevrolet, Olds, Pontiac, Inc.* (July 23, 1992), Paulding App. No. 11-91-7, unreported. Nevertheless, we find no prejudice to the appellant, as the trial court, in response to appellant's motion for judgment notwithstanding the verdict, adopted the amount of damages decided by the jury as reasonable and appropriate. As the amount of damages was ultimately determined by the court, no prejudice arose. The third assignment of error is without merit.

In the fifth assignment of error, appellant claims the trial court erred in denying its motion for a directed verdict on appellees' claim for punitive damages, alleging there was no evidence presented to justify awarding punitive damages.

R.C. 2315.21, governing the recovery of punitive damages, reads in pertinent part:

> (B) * * * punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless * * * :
>
> (1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

Where there is evidence that appellees raised concerns over abusive sexual harassment by Boucher with Gary Bradford, appellant's operations manager, that Bradford then told appellees their allegations were untrue and to drop their allegations if they wished to remain employed despite his later opinion that the acts complained of could have happened, that Boucher continued to engage in sexually harassing conduct, and that appellees subsequently complained to appellant's controller without result, a jury could reasonably come to differing conclusions as to the adequacy of appellant's response to the allegations and as to whether appellant ratified the acts of Boucher.

Moreover, in light of these facts and other testimony pertaining to appellees' travails at Edward's restaurant, we conclude that sufficient evidence was adduced to permit reasonable minds to conclude that appellant abandoned appellees to their tormenter. *Strother v. Hutchinson.* Therefore, the denial of appellant's motion for directed verdict was proper. The fifth assignment of error is overruled.

Appellant next claims it is entitled to a new trial based upon the trial court's overruling of its motion for mistrial. Appellant moved for a mistrial following a statement by appellees' counsel, in rebuttal closing argument, that appellee Delaney "won" her case before the National Labor Relations Board. As no evidence was presented on this matter at trial, appellant claims this statement invited the jury to reach its decision on matters outside the evidence adduced at trial, *i.e.*, because Delaney prevailed at the NLRB, she was entitled to prevail below, too. See *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 474 N.E.2d 291.

Appellant's sixth assignment of error is not well taken. Appellant is correct that no evidence of the NLRB proceedings was admitted at trial. However, the transcript of the proceedings records the statement by appellee's counsel as:

> [I]nstead what [the police officer] told Mrs. Delaney was that it was a civil matter, to go to the NLRB, and she did, and she went to the NLRB.

Appellant's counsel objected and moved for a mistrial, claiming the remark was prejudicial and misleading. This record hardly mandates the conclusion that Delaney prevailed at the NLRB as appellant urges.

Moreover, any prejudice from this remark was minimal in light of the following questions posed by appellant's counsel at the voir dire of the prospective jurors:

> And in the case of one of the plaintiffs, the [NLRB] found a violation of the National Labor Relations Act.

> Now, do you all understand that what may be a violation of the National Labor Relations laws may not necessarily be a violation of the civil laws that you're going to deal with in this lawsuit * * * .

This argument is feckless. While remarking on matters outside the evidence presented at trial is not proper argument, the negligible effect of the remarks here does not mandate a new trial.

Appellant next, in its seventh assignment of error, asserts that the jury's verdicts finding appellant liable to appellees for sexual harassment, and finding that appellee Delaney was wrongfully discharged for complaining of and refusing to participate in check-padding conducted by Boucher, are against the manifest weight of the evidence. This claim is without merit.

A judgment supported by some competent, credible evidence going to all essential elements of the case will not be reversed as being against the manifest weight of the evidence. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614 N.E.2d 742; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

A review of the record reveals ample evidence from which the trier of fact could have found each element of both claims. Testimony was elicited indicating appellee Delaney was fired only days after informing appellant that she refused to participate in padding checks, and that Boucher then threatened to replace her "with young women * * * [who will] do exactly as they are told." Appellant adduced evidence of Delaney's fighting with employees and talking with customers about company

matters which tended to contradict those claims. Appellees similarly adduced evidence of sexual harassment by appellant's employee Boucher both before and after they complained of these acts on November 15, 1990.

As some competent, credible evidence was presented at trial, the resolution of these factual disputes was properly left to the jury sitting as the trier of fact, as in "either civil or criminal cases, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Accordingly, the seventh assignment of error is overruled.

In its eighth assignment of error, appellant claims the trial court erred in denying its motion for a directed verdict on appellee Delaney's claim for wrongful discharge in violation of public policy. It asserts that because, "[a]bsent statutory authority, there is no common-law basis in tort for [this] claim," the jury ought not to have been permitted to decide this issue, appellee having failed to properly pursue a claim under R.C. 4113.52, the Ohio whistleblower statute. *Tulloh v. Goodyear Atomic Corp.* (1992), 62 Ohio St.3d 541, 548 N.E.2d 729, syllabus. This assignment must fail.

In *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, the Ohio Supreme Court recognized a public-policy exception to the employment-at-will doctrine where an employee is discharged for a reason that is prohibited by statute. The plaintiff may pursue a tort claim under the exception discussed in *Greeley* only when the violated statute does

not provide an adequate civil remedy. *Provens v. Stark Cty. Bd. Of Mental Retardation & Developmental Disabilities* (1992), 64 Ohio St.3d 252, 594 N.E.2d 959.[7] To proceed, however, the plaintiff must aver violations of a specific statute. *Tulloh v. Goodyear Atomic Corp.*

In her complaint, Delaney claimed her discharge was in violation of the Ohio whistleblower statute, R.C. 4113.52. The joint trial statement, signed by both parties, and the evidence adduced and argued at trial, however, indicated her discharge was in violation of the policies set forth in R.C. 2921.03 and R.C. 2921.04 proscribing intimidating witnesses of criminal activity.

As the intimidation statutes do not provide for a civil remedy, appellant's motion for a directed verdict on appellee Delaney's claim was properly denied. *Provens v. Stark Cty. Bd. Of Mental Retardation & Developmental Disabilities.* The eighth assignment of error is overruled.

In its ninth assignment of error, appellant claims that trial court erred in admitting, over its objection, the testimony of appellee Lackey that she read a handwritten statement given to the Harrison police department by Shelly James, appellant's head waitress, in which James

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[7] See *Nienaber v. Hyper Shoppes, Inc.* (Apr. 13, 1994), Hamilton App. C-930175, unreported (no cause of action under *Greeley* where the sole statute relied upon by the plaintiff for her wrongful-discharge claim afforded a diverse and full civil remedy); but, see, *Haynes v. Zoological Soc. of Cincinnati* (Dec. 22, 1993), Hamilton App. No. C-910598, unreported (where plaintiff left with a limited remedy that failed to provide relief for her claims, plaintiff entitled to the extra protection afforded by the public-policy exception).

admitted that Boucher had padded customer checks. Appellant claims this statement was inadmissible as hearsay within hearsay. Evid.R. 805.

This assignment is overruled as Lackey's declaration concerned matters properly considered nonhearsay, and thus not subject to the exclusionary effect of Evid.R. 802. There is sufficient foundation in the record to conclude that James's statement was an admission by a party opponent because it related a statement offered against a party which was made by its servant concerning a matter within the scope of her employment, during the existence of the employment relationship. Evid.R. 801(D)(2)(d).

Having overruled all of appellant's assignments of error, we, therefore, affirm the judgment of the trial court.

KLUSMEIER, P.J., GORMAN and M.B. BETTMAN, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX G

The Supreme Court of Ohio

1994 TERM

To wit: October 19, 1994

Phyllis Delaney, Karen Watts, Brenda Lackey and Marlene Scheidt,	:	Case No. 94-1384
Appellees,	:	ENTRY
v.	:	
Skyline Lodge, Inc.,	:	
Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by McCaslin, Imbus & McCaslin.

(Hamilton County Court of Appeals; No. C920924)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Supreme Court, U.S.
FILED
JAN 31 1995
OFFICE OF THE CLERK

(2)

No. 94-1172

In The

Supreme Court of the United States

October Term, 1994

SKYLINE LODGE, INC.,

Petitioner,

vs.

PHYLLIS DELANEY, KAREN WATTS, BRENDA LACKEY AND MARLENE SCHEIDT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Ohio Courts violated Petitioners Due Process Rights where Petitioner was given a full opportunity to present evidence on the amount of punitive damages to be awarded against it but failed to offer or request to offer any such evidence.

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No. 94-1172

In The

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October Term, 1994

SKYLINE LODGE, INC.,

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vs.

PHYLLIS DELANEY, KAREN WATTS,
BRENDA LACKEY AND MARLENE SCHEIDT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

STATEMENT OF THE FACTS

Respondents Phyllis Delaney, Karen Watts, Brenda Lackey and Marlene Scheidt were waitresses at a restaurant owned and operated by Petitioner Skyline Lodge, Inc. Respondents sued Skyline alleging that the restaurant manager, Peter Boucher, sexually harassed them by the use of offensive language. As the Hamilton County, Ohio Court of Appeals noted:

> Boucher told . . . jokes in the public and work areas of the restaurant. Boucher made off-color remarks in front of customers while placing his arm around the appellees and drawing them

> close to him. He referred to the female waitresses as "cunts" and "bitches." He made disparaging, unwelcome remarks about Delaney's breasts in public. He told Scheidt that she could go home early and "give her husband some," that he bet she got "laid" last night and that he presumed she was good in bed.

(A. 28).

Respondents reported the harassment to Boucher's supervisor, Gary Bradford. Although Bradford claimed at trial to have warned Boucher to cease his conduct, Defendant kept Respondents under Boucher's supervision. Shortly afterwards, Boucher threatened Respondents Delaney and Scheidt with a gun, continued to use offensive language in Respondent's presence, lowered his pants while staring at Respondent Scheidt for an extended period of time, and fired Respondent Delaney. In the words of the Court of Appeals:

> We conclude that sufficient evidence was adduced to permit reasonable minds to conclude that Appellant abandoned Appellees to their tormentor.

(A. 40).

On September 9, 1992, a jury found for Respondents and awarded them a total of $100,000.00 in compensatory damages. The amount of punitive damages was initially left to the jury, in contravention of ORC § 2315.21 which calls for the Court to make the decision.[1] The jury

---

[1] The Ohio Supreme Court has recently invalidated § 2315.21, once again leaving the issue for the jury. *Zoppo v. Homestead Insurance Co.*, 71 Ohio St.3d 552, 1994 WL 723009 (Dec. 30, 1994).

awarded a total of $108,000.00 in punitive damages to the four Respondents. Subsequently the Court used the jury verdict as an advisory verdict and adopted its findings as its own. The Court of Appeals found:

> . . . no prejudice to the Appellant, as the trial court, in response to Appellant's motion for judgment notwithstanding the verdict, adopted the amount of damages decided by the jury as reasonable and appropriate. As the amount of damages was ultimately determined by the court, no prejudice arose. The third assignment of error is without merit.

(A. 39).

Petitioner did not claim in either the trial court or the Court of Appeals that the adoption by the Trial Court of the jury's determination prevented it from presenting evidence regarding the amount of punitive damages. Nor did Petitioner ever request to present such evidence. The issue was raised for the first time in Petitioner's motion to certify to the Ohio Supreme Court which was denied. Petitioner now seeks review by this Court.

REASONS FOR DENYING THE WRIT

Petitioner alleges that it was prevented from presenting evidence regarding the amount of punitive damages. Apparently Petitioner is claiming it assumed it would be given an opportunity to present evidence regarding the amount of punitives when the issue was addressed by the Trial Court. Petitioner claims it was denied due process when the Trial Court improperly allowed the jury to decide the amount of punitive damages and subsequently

adopted those damages without an evidentiary hearing. Petitioner however fails to indicate why it assumed, in light of the complete absence of statutory authority or any indication from the Trial Court, that there would be a separate hearing on the amount of punitive damages. The trial court did not reject, or prevent Petitioner from offering, evidence regarding the amount of punitive damages. Nor did the trial court lull Petitioner into assuming it would be given an opportunity to present such evidence in a subsequent hearing. There simply was no conduct on the part of the trial court which operated to deprive Petitioner of its right to offer evidence on the amount of punitive damages. Petitioner did not request to put on additional evidence when the Trial Court indicated it would allow the jury to decide the amount of punitive damages. Petitioner failed to request an evidentiary hearing in response to the Trial Court's adoption of the jury's award. Nor did Petitioner argue in its motion JNOV that the Court should not adopt the jury's award of punitive damages because it was not given an opportunity to present evidence regarding the appropriate amount of punitive damages. There is nothing in the record that suggests the trial court would have rejected Petitioner's request to offer evidence on the amount of punitive damages at any stage of the proceedings had Petitioner simply requested an opportunity to present such evidence. Neither circumstance nor the trial court prevented Petitioner from offering evidence on the amount of punitive damages. Petitioner was not denied due process, it simply failed to take advantage of the process.

Petitioner also failed to argue in the Court of Appeals that it was prevented from offering evidence regarding

the appropriate amount of punitive damages. The issue was raised for the first time in Petitioner's appeal to the Ohio Supreme Court which was rejected.

Petitioner had full opportunity to present any evidence it wanted to at trial but failed to do so. After the trial Petitioner had a full opportunity to argue that the Trial Court should not adopt the jury's award of punitive damages because it was denied an opportunity to present evidence on the amount of punitive damages. Respondent failed to make such arguments until over two years later when it petitioned the Ohio Supreme Court for review. It is questionable whether Petitioner ever intended to put on evidence regarding the amount of punitive damages. If so, it waived that right by failing to offer any such evidence at trial and by failing to request a separate hearing to present such evidence after trial. The Trial Court took no action to prevent Petitioner from offering the evidence it now claims it wished to offer.

CONCLUSION

For all the above reasons, the petition should be denied.

Respectfully submitted,

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